Supreme Court, U.S.
FILED

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No. OFFICE OF THE CLERK

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1994

WILLIAM HOPE,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

Petition for Writ of Certiorari to the
United States Court of Appeals
for the Seventh Circuit

PETITION FOR WRIT OF CERTIORARI

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(1a) QUESTIONS PRESENTED

(1)(A) Whether the 7th Circuit's determination that it had no subject matter jurisdiction - precluding defendant from appellate review of the District Court's denial of his sec. 2255 petition challenging his 30-year sentence on grounds amounting to "actual innocence" - deprives defendant of substantive and procedural due process, for it rests on unduly strict application of the Federal Rules of Civil Procedure under which defendant's notice of appeal was deemed untimely, despite compelling facts to which the "unique circumstances" doctrine [as per Thompson v. Immigration Service, 375 U.S. 384 (1964), and Osterneck v. Ernst & Whinney, 489 U.S. 169 (1991)], should

apply to allow late filing of notice of appeal, here--where, the "unique circumstances" are that defendant was actively misled by the government's agreements to his two motions for extension of time to file a Rule 59 Motion, and by the District Court's granting these extensions - despite that, unknown to defense counsel at the time, the District Court had no authority to extend the time for filing a Rule 59 Motion; and, but for thus being misled, defendant could have and would have timely filed his notice of appeal;

(B) Whether the above 7th Circuit ruling conflicts with the governing principle, applied by this Court, that habeas proceedings are equitable [Hilton

v. Braunskill, 481 U.S. 770 (1987); Schlup v. Delo, 513 U.S. ___, 91 L.Ed.2d 364 (1995)], so as to avoid strict application of *res judicata* in the "successive petition" context, where defendant may be actually innocent. [McCleskey v. Zant, 499 U.S. 467 (1991); Schlup v. Delo, supra; Kuhlmann v. Wilson, 477 U.S. 436 (1986).]

(1b) PARTIES INVOLVED [per Rule 21.1(b)]

Petitioner, William Hope, was the defendant in the United States District Court for the Northern District of Illinois, Eastern Division, and appellant in the United States Court of Appeals for the Seventh Circuit.

Respondent, United States of America, was the plaintiff in the District Court, and appellee in the Court of Appeals.

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Certiorari should be allowed, because this cause is an ideal vehicle wherein this Court can determine that equitable principles peculiarly applicable in habeas proceedings must be utilized in determining whether the "unique circumstances" doctrine applies to permit a late notice of appeal.

The 7th Circuit's determination that it

review of the District Court's denial of his sec. 2255 petition challenging his 30-year sentence on grounds amounting to "actual innocence" - deprives defendant of substantive and procedural due process, for it rests on unduly strict application of the Federal Rules of Civil Procedure under which defendant's notice of appeal was deemed untimely, despite compelling facts to which the "unique circumstances" doctrine [as per Thompson v. Immigration Service, 375 U.S. 384 (1964), and Osterneck v. Ernst & Whinney, 489 U.S. 169 (1991)], should apply to allow late filing of notice of appeal. Here, the "unique circumstances" are that defendant was actively misled by the government's agreements to his two motions for extension of time to file a Rule 59 Motion, and by the District Court's granting these extensions - despite that, unknown to defense counsel at the time, the District Court had no authority to extend the time for filing a Rule 59 Motion; and, but for thus being misled, defendant could have and would have timely filed his notice of appeal. The 7th Circuit's ruling conflicts with the governing principle, applied by this Court, that habeas proceedings are equitable [Hilton v. Braunskill, 481 U.S. 770 (1987); Schlup v. Delo, 513 U.S. ___, 91 L.Ed.2d 364 (1995)], so as to avoid strict application of *res judicata* in the "successive petition" context, where defendant may be actually innocent.

"successive petition" context, where defendant may be actually innocent. [McCleskey v. Zant, 499 U.S. 467 (1991); Schlup v. Delo, supra; Kuhlmann v. Wilson, 477 U.S. 436 (1986).] 17

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(1d) Judgment Below

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IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1995

No.

WILLIAM HOPE,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

Petitioner, William Hope, (hereafter, petitioner, or defendant), prays that a writ of certiorari issue to review the judgment of the Court of Appeals for the Seventh Circuit, affirming denial of his habeas corpus petition filed pursuant to

28 U.S.C. 2255 by the United States District Court for the Northern District of Illinois, Eastern Division.

Judgment, Opinion and Orders Below

The Opinion of the Court of Appeals for the Seventh Circuit, affirming the District Court's judgment, is set out as App. A. The Opinion is reported at 43 F.3d 1140 (7 Cir. 1994). The order denying rehearing in banc, dated Feb. 15, 1995, is set out as App. B. The judgment of the District Court, dated April 27, 1993, is set out as App. C, and the order denying reconsideration on Aug. 3, 1993, is set out as App. D.

Jurisdictional Statement

On December 8, 1994, the Court of Appeals filed its Opinion (App. A) affirming the judgment of the District Court. Petition for rehearing en banc, timely filed, was denied on February 15, 1995.

This Petition for Certiorari is timely filed within 90 days thereafter.

Jurisdiction is invoked under 28 U.S.C. Sec. 1254(1) and Rules 10.1, 12.1 and 13.1 of this Court.

Constitutional Provisions

The Fifth Amendment to the U.S. Constitution provides, in pertinent part:

> "No person shall ... be deprived of life, liberty or property, without due process of law; ..."

The Sixth Amendment to the U.S. Constitution provides, in pertinent part:

> "In all criminal prosecutions, the accused shall enjoy the right ... to have the Assistance of Counsel for his defence."

STATEMENT OF THE CASE

In 1975, defendant, twenty-six years old, a person addicted to narcotics, was charged with burglary of an automobile dealership. His lawyer told him that there was an Illinois State statute which would permit him to be treated for his drug addiction and that he could enter into arrangements with the court so that, if he satisfactorily completed the drug addiction program, he would not have a conviction. (App. 42)[1] He was told by the trial judge that if he entered a plea under Chap. 91 1/2, Sec. 120.1 et. seq., and if he went to Gateway House and completed the period

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[1]References to App. without a letter designation are to Appellant's Appendix filed in the Court of Appeals.

of treatment at Gateway House, there would be no finding against him and the sentence of 3 to 9 years, which would be imposed only if he violated the conditions of Gateway House, would not be imposed, and there would be no conviction. (App. 31-39)

However, neither his lawyer nor the trial judge realized that because he was on parole, he could not be placed in Gateway House and treated unless, pursuant to statute (Chap. 91 1/2, Sec. 120.8), there was prior permission of the parole authorities. (App. 41) No permission was obtained. He went to Gateway House and was living up to the conditions of Gateway House when parole authorities came, seized the defendant and returned him to the

penitentiary--not upon this 1975 charge, but as a parole violator.[2]

In 1987, defendant was arrested and ultimately charged with a federal

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[2]There is no dispute that defendant was never sentenced to the 3 to 9 year sentence and no judgment of conviction was entered. In the Illinois Appellate Court, where the validity of what occurred is presently also being litigated, the State in its Statement of Facts on page 9 in the Brief filed in People v. Mason (defendant was known in the State Court as Carmelo Mason), No. 92-1459, the State asserts:

> "At the time of the above summarized proceeding, defendant was on parole for a previous burglary conviction. Defendant was subsequently arrested and sent back to the penitentiary for violation of parole on the prior burglary offense. It is clear that at no time was any further action taken as to the instant burglary conviction, and it is clear that defendant was never sentenced to the penitentiary concerning the instant burglary conviction." (Emphasis added.)

offense. At trial, he was represented by Attorney Lavon Pride. If not eligible for enhancement under 18 U.S.C. Sec. 924, the maximum sentence was 5 years. He was sentenced under 18 U.S.C. Sec. 924(e) to 30 years. At sentencing, he was represented by Attorney Lavon Pride and Attorney Greg Schlesinger. (App. 20-26) At the federal sentencing, because of other commitments and lack of preparation caused thereby, defendant's counsel did not present substantial evidence to the court on the crucial issue of whether the defendant had a conviction arising out of the 1975 occurrence. The reasons for counsel's not bringing before the court matters which, as demonstrated below, were clearly relevant, had to do with failure

to have properly prepared. He originally requested a continuance to see the State file. (App. 72) He withdrew that request, not because he had obtained the appropriate evidence, but merely because of a conflict in his schedule which mitigated his resolving the instant matter. (App. 73) He failed to demonstrate (1) that a copy of the "half-sheet" (Memorandum of Orders) did not show that a conviction was entered and did show that sentence of 3 to 9 years was withheld (App. 44-46), and hence, the action of the clerk in preparing a certification of conviction (App. 47) was in error; (2) he did not obtain a transcript of the trial court proceedings (App. 30-40) that demonstrated that no sentence to the

penitentiary and/or conviction was imposed and defendant was told none would be, if he completed treatment; (3) he did not demonstrate and raise that whatever occurred would have been procured in violation of the defendant's right to effective assistance of counsel--(State trial counsel was ineffective for not knowing that defendant was not eligible under Chap. 91 1/2, Sec. 120.8)--and not asserting that whatever occurred, occurred in violation of defendant's due process rights (it was a violation of due process to promise the defendant that there would be no conviction, where he was not eligible for such result under the applicable statutes); (4) he did not obtain a readily available affidavit

from the State Court sentencing judge that stated that at the time of disposition, defendant was advised that no conviction would be entered against him if he satisfactorily completed Gateway House. (See pp. 29-30, infra.)[3]

Counsel did not obtain and present the affidavit of defendant stating that he would not have plead if he had been told it would result in a conviction, even if he completed Gateway House successfully. (App. 42)

Counsel did not present prevailing law which would have persuaded the

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[3]At the time the affidavit was given, Judge Louis B. Garippo had retired from the bench. This document was not before the United States District Court that sentenced defendant, or the Seventh Circuit.

District Court that there was no valid conviction (see law that was available to counsel, per pp. 34-36, 40, infra.)

Not having before it such relevant facts and argument, the United States District Court found that there was a conviction, and therefore sentenced the defendant to 30 years.

Attorney Schlesinger, who had been co-counsel at the sentencing hearing, (App. 25), proceeded with the appeal. Although he raised the issue that counsel was ineffective at trial, he did not argue the ineffectiveness of counsel in the District Court relative to the matters heretofore set out demonstrating all the things that counsel failed to do with respect to sentencing. He did not

and could not, because to do so,[4] of course, would have been to raise his own ineffectiveness.

The Court of Appeals specifically pointed out that the constitutional challenge raised by counsel below was deficient, due to the absence of both a legal and a factual basis. United States v. Hope, supra, 906 F.2d at 263.

Thereafter, defendant filed a Sec. 2255 Petition in the District Court. That Petition set out (1) that counsel, both (a) in the United States District Court at the sentencing hearing and (b) on direct appeal, rendered ineffective assistance of counsel, and (2) that the State Court proceeding in 1975 (a) was

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[4]His argument was de minimus.

invalid and (b) did not result in a constitutionally valid conviction. The District Court denied that Petition (App. C)

Chronology and Procedural History

The original order denying habeas corpus was entered April 27, 1993.

On May 4, 1993--within the 10-day time limitation for filing a Rule 59 motion as to the order of April 27, 1993 denying the Sec. 2255 petition--Hope filed his "AGREED MOTION TO EXTEND TIME UNTIL MAY 24, 1993 TO FILE MOTION FOR RECONSIDERATION OF ORDER OF APRIL 27, 1993." (App. II, 53-55) The Motion is verified via Affidavit of undersigned counsel. (App. II, 55) Paragraph 1 of the said "Agreed Motion," over counsel's affidavit, avers:

> "1. Scott Collins, Assistant United States Attorney, has no objection to the grant of this motion." (App. II, 54, par. 1)

The District Court granted the said "Agreed Motion" the following day, May 5, 1993, extending the time until May 24, 1993. (App. II, 56)

On May 21, 1993, within the time as thus extended, Hope filed his "AGREED MOTION TO EXTEND TIME UNTIL JUNE 14, 1993 TO FILE MOTION FOR RECONSIDERATION OF ORDER OF APRIL 27, 1993." (App. II, 57-59) Again, par. 1, over undersigned counsel's affidavit, (App. II, 60), avers that AUSA Scott Collins "has no objection to the grant of this motion." (App. II, 58, par. 1)

Defendant's Motion for Reconsideration (with supporting

Memorandum and attachments) was filed on June 14, 1993 (R. 114), within the time as extended by the court's orders (R. 111, 113) allowing each of defendant's two aforesaid **agreed** timely-filed motions for extension. (R. 110, 112) This motion for reconsideration was denied. (App. D)

The Court of Appeals, holding it had no subject matter jurisdiction as to the original denial of the habeas corpus, entered on April 27, 1993, affirmed. (App. A)

REASONS FOR GRANTING CERTIORARI

1.

Certiorari should be allowed, because this cause is an ideal vehicle wherein this Court can determine that equitable principles peculiarly applicable in habeas proceedings must be utilized in determining whether the "unique circumstances" doctrine applies to permit a late notice of appeal.

The 7th Circuit's determination that it had no subject matter jurisdiction - precluding defendant from appellate review of the District Court's denial of his sec. 2255 petition challenging his 30-year sentence on grounds amounting to "actual innocence" - deprives defendant of substantive and procedural due process, for it rests on unduly strict application of the Federal Rules of Civil Procedure under which defendant's notice of appeal was deemed untimely, despite compelling facts to which the "unique circumstances" doctrine [as per Thompson v. Immigration Service, 375 U.S. 384 (1964), and Osterneck v. Ernst & Whinney, 489 U.S. 169 (1991)], should apply to allow late filing of notice of appeal. Here, the "unique circumstances" are that defendant was actively misled by the government's agreements to his two motions for extension of time to file a Rule 59

Motion, and by the District Court's granting these extensions - despite that, unknown to defense counsel at the time, the District Court had no authority to extend the time for filing a Rule 59 Motion; and, but for thus being misled, defendant could have and would have timely filed his notice of appeal. The 7th Circuit's ruling conflicts with the governing principle, applied by this Court, that habeas proceedings are equitable [Hilton v. Braunskill, 481 U.S. 770 (1987); Schlup v. Delo, 513 U.S. ___, 91 L.Ed.2d 364 (1995)], so as to avoid strict application of *res judicata* in the "successive petition" context, where defendant may be actually innocent. [McCleskey v. Zant, 499 U.S. 467 (1991); Schlup v. Delo, supra; Kuhlmann v. Wilson, 477 U.S. 436 (1986).]

The Seventh Circuit held that defendant was barred from appealing from the District Court's denial of habeas corpus pursuant to 28 U.S.C. Sec. 2255, because notice of appeal was filed late. The Court of Appeals held that the "unique circumstances" doctrine was inapplicable, even though the notice was

not timely filed because of counsel's reliance upon actions of the District Court in extending time to file post-judgment motions.

This ruling is contrary to due process and to this Court's opinions concerning the application of equitable principles to habeas corpus proceedings. McCleskey v. Zant, 499 U.S. 467, 113 L.Ed.2d 517 (1991); Hilton v. Braunskill, 481 U.S. 770, 95 L.Ed.2d 724 (1987); Schlup v. Delo, 513 U.S. ___, 130 L.Ed.2d 808 (1995); Kuhlmann v. Wilson, 477 U.S. 436, 91 L.Ed.2d 364 (1986).

The chronology and procedural history is set out at pp. 14-16, supra.

Under these unique circumstances, defendant's case comes within the

"unique circumstances" doctrine as per Thompson v. Immigration Service, 375 U.S. 384 (1964), and Osterneck v. Ernst & Whinney, 489 U.S. 169 (1991), and is subject to the equitable principles applicable to habeas corpus proceedings. The original order denying the petition was entered on April 27, 1993, and defendant's **agreed** motion for extension was filed May 5, 1993 and granted on May 6, 1993; there was ample time for defendant to file a motion for new trial, if the government had not agreed, and/or if the court had not granted the request. The second motion for extension was filed within ample time--May 21--and again, the government **agreed** thereto. And again, on May 26, 1993, the court granted the **agreed** motion. If

the government had then raised the issue here raised, or if the court had not asserted by its action in granting the motion, that it had the right to grant the motion both on May 6, 1993 and May 26, 1993, it was **still within thirty days** since April 27, and defendant could have **then** filed his timely notice of appeal. Because the government was involved, F.R.App.P. 4(a), he had 60 days to file the notice of appeal. The motion for reconsideration was filed on June 16, 1993, within that 60 days. Hence, **if not for counsel being lulled by judicial and government action, the notice of appeal would have been timely filed**.

Tested by habeas corpus equitable principles, a late notice of appeal

should be permitted, because (a) counsel relied on the government and the court, (b) there is cause and prejudice, and (c) there is evidence of defendant's actual innocence. McCleskey v. Zant, 499 U.S. 467, 113 L.Ed.2d 517 (1991).

Although habeas corpus proceedings are tentatively regulated by civil procedure, courts must be guided by the unique nature of habeas corpus proceedings in light of the history and purpose of habeas practice. Hilton v. Braunskil, 481 U.S. 770, 95 L.Ed.2d 724 (1987). Cf. McCleskey v. Zant, supra, Schlup v. Delo, 513 U.S. ___, 130 L.Ed.2d 808 (1995), and Kuhlmann v. Wilson, 477 U.S. 436, 91 L.Ed.2d 364 (1986). In Schlup v. Delo, supra, this Court stated:

> "At the same time, the Court has adhered to the principle that **habeas corpus is, at its core, an equitable remedy**. This Court has consistently relied on the equitable nature of habeas corpus to preclude application of strict rules of res judicata." 130 L.Ed.2d at 831. (Emphasis added.)

See Karstetter v. Cardwell, 399 F.Supp. 1298 (S.D.N.Y. 1975) (late filing of notice of appeal allowed on finding of "excusable neglect"). There, a State prisoner's time for filing Notice of Appeal from denial of habeas corpus had elapsed due to counsel's erroneous calculation; he asserted the bulk of his practice involved cases wherein the United States is a party, and therefore calendared the case as one with a 60-day period for filing notice of appeal, rather than the actually applicable 30-day period. The Court

concluded that for purposes of filing a tardy notice of appeal, although a petition for writ of habeas corpus is a civil, as opposed to a criminal, proceeding, the standard of "excusability" utilized in criminal, rather than in civil cases must apply, because "a man's liberty is at stake" in habeas proceedings. Accord, Inglese v. Warden, 687 F.2d 362 (11 Cir. 1982).

Here, where the notice of appeal was filed late due to ineffective assistance of counsel and/or excusable neglect, because counsel was nct aware of application of F.R.C.P., Rules 59 and 60 and impermissibly relied upon the acquiescence of both the government and the court, and there is cause and prejudice, a late notice of appeal

should have been permitted.

There is cause, because when a lawyer fails to file a notice of appeal where both defendant and his lawyer intend to file the notice of appeal, but counsel does not do so, that rises to the level of ineffective assistance of counsel amounting to "cause." Rodriquez v. United States, 395 U.S. 327, 23 L.Ed.2d 340 (1969). There: "[P]etitioner's counsel did not submit a notice of appeal within the 10-day period specified" by the then-applicable Rule.[5] This Court held it was not necessary to meet the heaviest standard and prove violation of defendant's

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[5]F.R.Cr.P. 37(a), which had been superseded by F.R.App.P. 4(b). Id. at 328 n.1, 23 L.Ed.2d at 343 n.1.

constitutional rights through a Sec. 2255 Petition; instead, because the notice was not timely filed due to ineffective assistance, this Court remanded for appointment of counsel and to permit defendant to proceed with a direct appeal. Accord, Bell v. Lockhart, 795 F.2d 655 (8 Cir. 1986); Lozada v. Deeds, 498 U.S. 430, 112 L.Ed.2d 956 (1991); Shockey v. Illinois, 375 U.S. 22, 11 L.Ed.2d 43 (1963); Hollis v. United States, 687 F.2d 257 (8 Cir. 1982); Mack v. Smith, 659 F.2d 23 (8 Cir. 1981).

There is prejudice, because but for counsel's error, defendant would have had a right to appeal, and the reviewing court would be compelled to find defendant is innocent, for he has no

1975 Illinois conviction.

Defendant has been sentenced to 30 years **only** because the government asserted that defendant had a 1975 State conviction, where there was no such conviction; where the 1975 State proceeding itself violated defendant's constitutional rights; and where counsel in the federal trial and appellate courts failed to demonstrate the illegality of the 1975 proceeding, and their failure to do so itself was ineffective assistance of counsel.

THERE IS NO CONVICTION IN 1975 AND SURELY NOT A VALID CONVICTION BECAUSE DEFENDANT AGREED TO PLEAD WITH THE PROMISE THERE WOULD BE NO CONVICTION IF HE DID NOT VIOLATE CERTAIN CONDITIONS OF DRUG TREATMENT, WHICH HE DID NOT

VIOLATE; AND HENCE FINDING A CONVICTION WOULD VIOLATE DUE PROCESS.

ADDITIONALLY, HE PLED AFTER HIS LAWYER FAILED TO DETERMINE THAT HE WAS NOT ELIGIBLE FOR A DRUG TREATMENT PROGRAM, AND HENCE, HE WAS INDUCED TO PLEAD BY INEFFECTIVE ASSISTANCE OF COUNSEL.

On November 21, 1975, defendant, represented by an Assistant Public Defender (App. II, 30-40), entered a plea, having been induced to enter that plea by his counsel's advice to the defendant: (a) that he was eligible for treatment pursuant to Chap. 91 1/2, Sec. 120.1 etc. (when he was not); (b) that the court would place the defendant in Gateway House pursuant to said Chapter; and (c) that if defendant completed the treatment, no conviction or sentence

would be entered against him, i.e., it would be as if he were acquitted. The State judge confirmed this would occur when he told defendant:

> "I would withhold the finding and the judgment...." (App. II, 32)

The State trial judge (now retired) has provided an Affidavit; it was his understanding of the plea agreement that if defendant complied with the conditions of Gateway House, there would be neither a sentence nor a conviction:

> "3. There was a plea agreement ... with the understanding that defendant was to go to Gateway House, and that if he did not intentionally violate the conditions of Gateway House, no conviction would be entered against him ... [and] that if he did violate the conditions, he would be brought back to court and then a conviction would be

> entered and he would be sentenced to a period of three to nine years. By withholding judgment no sentence ever was imposed." (Emphasis added.) (See App. II, 18.)

Defendant has asserted in an uncontested affidavit that he would not have entered the plea if he had not been told--and believed--that he could avoid a conviction by entering a technical plea of guilty, entering Gateway House and abiding by the conditions of the drug treatment program. He would not have entered his plea if he had been told he was not eligible under Chap. 91 1/2, Sec. 120.8, without the parole officer's prior agreement, and that they did not agree. (App. II, 42)

The promise made to defendant by his counsel and the court--that if he

completed the program, there would be no conviction--was incorrect and false, because he was not eligible unless the parole authorities agreed, and they did not agree.[6] Thus, the plea violated due process because it was induced by a false promise, and was therefore not knowingly and intelligently made.

The situation is analogous to where the court and counsel advise defendant he is eligible for parole and defendant pleads guilty, but under the law, defendant is not eligible. Such plea is obtained in violation of due process,

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[6]Defendant never violated his obligations under the agreement with the court, because he never voluntarily left Gateway House, and instead administratively was sent from Gateway House to the penitentiary as a parole violator.

Gates v. United States, 515 F.2d 73 (7 Cir. 1975), and in violation of defendant's right to effective assistance of counsel. Garmon v. Lockhart, 938 F.2d 120 (8 Cir. 1991); United States v. Loughery, 908 F.2d 1014 (D.C. Cir. 1990). Here, defendant was expressly told by the trial court there would not be any conviction and sentence; that judgment was being withheld (App. II, 32, 38) if he complied with the conditions of Gateway. Such misapprehension by the defendant as to the consequences of the plea, renders the plea, and any subsequent conviction, constitutionally invalid. People v. Caravello, 2 Ill.App.3d 995, 278 N.E.2d 447 (1 Dist. 1971); People v. Nolte, 167 Ill.App.3d 915, 522 N.E.2d 283 (3 Dist.

1988), appeal denied, 122 Ill. 588, 530 N.E.2d 258; United States ex rel. Miller v. McGinnis, 774 F.2d 819 (7 Cir. 1985).

Due process was also denied because he was taken as a parole violator although he did not violate the conditions of Gateway. Having satisfied his part of the bargain, due process was violated because the State did not comply with its part of the bargain.

In any event, there was no valid conviction, because counsel's representation was defective. Counsel failed even to read the statute that in simple words [plain English] rendered defendant ineligible for the drug treatment alternative: "that a person is eligible, [unless] ... (e) the addict is on probation or parole and the

appropriate parole or probation authority does not consent to that election." 91 1/2, Sec. 120.8(e) (App. II, 41) Hence, he provided ineffective assistance, which renders the alleged conviction constitutionally invalid. Brewer v. Aiken, 935 F.2d 850 (7 Cir. 1991); Horton v. Zant, 941 F.2d 1449 (11 Cir. 1991); Cave v. Singletary, 971 F.2d 1513 (11 Cir. 1992); Prichard v. Lockhart, 990 F.2d 352 (8 Cir. 1993); Blackburn v. Foltz, 828 F.2d 1177 (6 Cir. 1987); Iaea v. Sunn, 800 F.2d 861 (9 Cir. 1986). The 1975 alleged conviction or plea therefore violates due process. United States ex rel. Miller v. McGinnis, supra.

It was appropriate for the District Court to review a matter partially considered on direct

appeal, where defendant, at his federal appeal and trial, had ineffective assistance of counsel.

The Seventh Circuit Court of Appeals did not have before it, due to ineffective assistance, relevant facts and law when it decided defendant's original appeal, United States v. Hope, 906 F.2d 254 (7 Cir. 1990).

Because on the date of the federal sentencing hearing, Mr. Schlesinger, who later served as appellate counsel, was co-counsel with trial counsel (App. II, 25), there can be no waiver of appellate counsel's failure to raise on direct appeal, the issue of ineffectiveness of trial counsel. This fact amounts to "cause" for not raising the issue of ineffective trial counsel on direct appeal. Therefore, the issue of

ineffectiveness of trial counsel can and should be reviewed via habeas corpus proceedings. See United States v. Castillo, 965 F.2d 238 (7 Cir. 1992); United States v. Derewal, 10 F.3d 100 (3 Cir. 1993). Failure of appellate counsel to effectively raise the issue of ineffectiveness of trial counsel satisfies the "cause and prejudice" test. United States ex rel. Barnard v. Lane, 819 F.2d 798 (7 Cir. 1987); Freeman v. Lane, 962 F.2d 1252 (7 Cir. 1992); Rosenwald v. United States, 898 F.2d 585 (7 Cir. 1990).

Defendant was denied effective assistance of appellate counsel in the federal court.

Although appellate counsel in United States v. Hope, supra, asserted the defect of the performance of trial

counsel (Appellant's Brief in United States v. Hope, No. 88-3134, pp. 39-41, App. II, 27-29), the position was presented in a most deficient manner. Counsel cited no cases. He failed to demonstrate that what the Court of Appeals held to be a failure of Hope to prove he was denied his rights in the State Court, was not due to absence of evidence or law, United States v. Hope, supra, at 263, but instead, was due to failure of counsel to present the evidence and law.

The appellate counsel, who was suffering under a demonstrable, facial conflict difficulty, never asserted, among other issues, that trial counsel rendered ineffective assistance in the District Court because he failed to

raise the issue that State trial counsel rendered ineffective assistance in the 1975 State proceeding. He also failed to present relevant controlling law that demonstrated there was no State conviction or sentence. People v. Teschner, 81 Ill.2d 187, 407 N.E.2d 49, 51 (1980); People v. Thomas, 204 Ill.App.3d 890, 562 N.E.2d 396, 398 (4 Dist. 1990); People v. Williams, 195 Ill.App.3d 433, 552 N.E.2d 389, 391 (4 Dist. 1990); People v. Tucker, 183 Ill.App.3d 333, 539 N.E.2d 243, 245 (2 Dist. 1989).

In the District Court, defendant was denied effective assistance of counsel.

Although counsel in the District Court originally objected to the admissibility of defendant's 1975

"conviction" and attempted a constitutional attack, his efforts were meager, to say the least:

> "The constitutional challenges which Hope raised at the trial level, however, were **conclusory in nature and lacked both a factual and legal basis.** Hope **presented no evidence** whatsoever to suggest that his plea of guilty in 1975 was not knowingly and voluntarily made, that his attorney at the time rendered constitutionally ineffective assistance, or that he was otherwise denied 'due process'." Hope, supra, at 263. (Emphasis added.)

This is, of course, precisely what was done in the habeas corpus proceedings.

Surely, counsel was ineffective, because sitting there, like a pear ready to be plucked, were facts demonstrating that the plea was induced by false promises and misleading advice of

counsel; and hence, defendant was denied due process and effective assistance of counsel. The evidence not presented was: transcript of the 1975 Illinois proceeding showing that defendant was told by the State trial judge that there would be no conviction (App. II, 30-40); affidavit of trial judge; law showing that the advice of counsel was ineffective assistance because it told defendant he was eligible, when he was not; evidence from the Illinois Department of Corrections showing that they never considered they received the defendant as a person convicted for the 1975 burglary (App. II, 43); Chicago Police Department "rap sheet" showing defendant was sentenced to 2 years drug abuse program, not sentenced to 3 to 9

years (App. II, 50); the affidavit of defendant asserting the misadvice that he received, and that he would have not proceeded to plead, but would have gone to trial, if he had known that he was ineligible for the drug program and that his actions would result in a conviction even though he complied with the conditions of Gateway House. (App. II, 42) Also not presented to the District Court was controlling law, as herein presented, demonstrating that upon those facts, the 1975 "plea" was constitutionally invalid.

Here, federal sentencing counsel's failure properly to prepare and investigate was due to preoccupation with preparation for the trial of some other defendant. He recognized he was

not prepared, and therefore requested a continuance to obtain the relevant State file. (App. II, 72) He then withdrew his request because of his need to commence a different trial. (App. II, 73)

Here, defendant's federal trial counsel totally failed to conduct the necessary investigation which would have demonstrated that there was no "conviction" rendering defendant eligible for an enhanced sentence. Failure to properly prepare for sentencing, or to properly object to or cause to be excluded evidence that was used to enhance defendant's sentence, is ineffective assistance of counsel. Brewer v. Aiken, 935 F.2d 850 (7 Cir. 1991); Horton v. Zant, 941 F.2d 1449 (11

Cir. 1991); Cave v. Singletary, 971 F.2d 1513 (11 Cir. 1992) (failure to prepare); Prichard v. Lockhart, 990 F.2d 352 (8 Cir. 1993) (failure to object and prevent use of out-of-state conviction for enhancement).

IN SUMMARY

Applying the equitable principles applicable to habeas corpus proceedings, under the unique circumstances doctrine, a late notice of appeal should have been permitted because here, the present result is to permit the lengthy incarceration of a person who is innocent of having a prior conviction.[7]

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[7]One last time: The enhanced sentence, 30 years, is 6 times greater than the greatest sentence defendant could have received on the firearm charge, if the 1975 State proceeding had not been counted as a conviction.

There was no constitutionally valid 1975 conviction or sentence. Hence, the 30 year federal enhanced sentence is illegal and unconstitutional.

CONCLUSION

For the foregoing reasons, the petition for writ of certiorari should be granted.

Respectfully submitted,



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